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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. [redacted]97

ELIAS MILLER, PAUL MILLER, ANNA MILLER and HELEN MILLER, and ELIAS MILLER and PAUL MILLER, and Executors of the Estate of GEORGE MILLER, Deceased,

Petitioners,

vs.

IRVING SULMEYER, Trustee in Bankruptcy of the Estate of DELCON CORPORATION, Bankrupt,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

REPLY AND SUPPLEMENTAL BRIEF OF PETITIONERS.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 981

ELIAS MILLER, PAUL MILLER, ANNA MILLER and HELEN MILLER, and ELIAS MILLER and PAUL MILLER, and Executors of the Estate of GEORGE MILLER, Deceased,

Petitioners,

vs.

IRVING SULMEYER, Trustee in Bankruptcy of the Estate of DELCON CORPORATION, Bankrupt,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

REPLY AND SUPPLEMENTAL BRIEF OF PETITIONERS.

Prefatory Comment.

At the outset it is to be noted that the opinion in the *Moore* case (284 U. S. 4, 52 S. Ct. 3, 75 L. Ed. 133) indicates that the respondent therein (the chattel mortgagee) had not entered his appearance in this court and the opinion does not indicate whether an answering brief was filed by the respondent and whether this Honorable Court had the benefit of the respondent's views on the specific legal problem discussed in the *Moore* decision.

It is to be further noted that the opinion of the Court of Appeals in the case at bar is apparently premised on

the legal theory that the bankrupt's creditors who came into existence after the recordation of the Millers' chattel mortgage (recorded more than four months before bankruptcy) *should be placed in the same category and classification* with the bankrupt's creditors who came into existence during the intervening period between the date of the execution of the chattel mortgage on June 1, 1954, and the date of its delayed recordation on August 19, 1954. Petitioners respectfully contend that *classification* of creditors is determinable by the state law, and that creditors coming into existence after the recordation of a chattel mortgage *more than four months before bankruptcy* cannot be placed in the same category with the creditors who came into existence during the intervening period between the date of the execution of the chattel mortgage and the date of its delayed recordation.

We wish to preface the points discussed in this reply and supplemental brief with a brief restatement of the following legal principles firmly established by the recent decisions of this Court and of the California Supreme Court.

1. "Cases are not decided, nor the law appropriately understood, *apart from an informed and particularized insight into factual circumstances of the controversy under litigation*" (*Federal Maritime Board v. Isbrandstern Co.*, 356 U. S. 481, 78 S. Ct. 851, 861, 2 L. Ed. 926; italics added), and "this principle has particular force where the courts are asked to strike down on grounds of public policy a contractual arrangement on its face consensual" (*Southwestern Sugar, etc. v. River Term Corp.*, 78 S. Ct. Rep. 1210 at 1217).

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2. While *in the abstract*, the specific legal problem discussed in the *Moore* decision in its application to the

facts therein particularized involved the construction of a few isolated sections of the Bankruptcy Act, the problem posed by the record in the case at bar involves the construction of the Bankruptcy Act assayed in its entirety and in the light of the philosophy of the Bankruptcy Act in its application to *the equitable factual setting presented by the present record.* The Millers' equities posed by the present record analyzed in the light of the equitable philosophy of the Bankruptcy Act involve a more "perceptive process than is conveyed by the delusive phrase ascertaining the intent of the legislature (to borrow the language of Mr. Justice Frankfurter in *San Diego Building Trades Council v. Garmon,* 79 S. Ct. Rep. 773 at 776-777).

3. In *Gage v. Jordan,* 23 Cal. 2d 794, the California Supreme Court declared in effect at page 800 that where the language of a statutory provision is susceptible of two constructions, one of which in its application to the precise facts presented by the record will render it reasonable, fair and harmonious with the manifest legislative purpose and another which would be productive of unjust consequences, the former construction will be adopted and followed by the courts.

It requires no argument that the legal factual setting in the *Moore* case and the equitable factual setting in the case at bar are poles apart. It seems that the above stated firmly established legal and equitable principles were not given due consideration by the Court of Appeals and by the respondent in his responsive brief filed herein.

This reply and supplemental brief is addressed to the following subsidiary points which are fairly comprised in the statement of the questions presented in the ceritorari petition.

I.

Under the California Substantive Law a Mortgage Is a Contract Under Which the Mortgagee Acquires a Property Interest.

Section 2920 of the California Civil Code reads as follows:

> "Mortgage is *a contract* by which specific property is hypothecated for the performance of an act, without the necessity of a change of possession." (Italics added.)

The primary purpose of a chattel mortgage is to transfer title of personalty to the mortgagee as security for the performance by the mortgagor of his contractual obligation.

> *Bank of California v. McCoy*, 23 Cal. App. 2d 192, 195.

The property interest vested in the mortgagee is in the nature of a lien securing the enforcement of the mortgagor's contractual obligation.

> *Estate of McLaughlin*, 97 Cal. App. 485, 489.

The evolution of the equitable philosophy of the Bankruptcy Act is explicated in the recent decision of this Court in *United States v. Embassy Restaurant, Inc.*, 79 Sup. Ct. 554, wherein the Court stated at page 555 that "the broad purpose of the Bankruptcy Act is to bring about *an equitable* distribution of the bankruptcy estate" and that "*if one claimant is to be preferred over others, the purpose should be clear from the statute.*" (Italics added.)

It is respectfully submitted that there is no language in the Bankruptcy Act tending to support the broad conten-

tion made by the trustee in bankruptcy that Sections 70(c) and 70(e) of the Bankruptcy Act were intended to strike down Millers' property interest in their valid chattel mortgage which the record conclusively shows was executed about eight months before bankruptcy and which the trustee in bankruptcy *concedes* in his responsive brief *was not a preference under Section 60 of the Bankruptcy Act.* Nor is there any language in the *Moore* decision to lend support to the respondent's such sweeping and inequitable contention.

Furthermore, the chattel mortgage involved in the *Moore* case (amplified *infra*) *was conclusively fraudulent against all of the creditors of the bankrupt-mortgagor, including the bankrupt's future creditors; while the mortgage in the case at bar was valid against the future creditors of the bankrupt under the California decisions as stated at page 19 of the certiorari petition.*

II.

The Moore Decision Was Handed Down in 1931, Eight Years Prior to the Enactment of the Uniform Fraudulent Conveyance Act; and Under Section 3440 of the California Civil Code in Force in 1931, the Mortgage in the Moore Case Was Conclusively Fraudulent Against All of the Creditors of the Mortgagor Including His Future Creditors.

The California State law on this point is summed up in 23 Cal. Jur. 2d, Par. 78 at pages 526-527, wherein it is stated:

> "Proscribed transfers of personal property without immediate delivery are 'conclusively presumed fraudulent and void,' as are those made in violation of the bulk sales law. Also, instruments made with

intent to defraud, as described in Civil Code Sec. 1227, are 'void.' But the Uniform Fraudulent Conveyance Act says simply that conveyance within its provisions are 'fraudulent.' In each instance, however, the stated effect is 'as against' creditors or others who are brought within the protection of the statute.

"On the ground that a debtor who makes a conveyance with actual intent to defraud creditors is subject to criminal prosecution, it has been said that such a conveyance is void, not voidable, and that it may therefore be attacked by any creditor, existing or future."

In 24 Am. Jur. at pages 284-285, it is stated:

"The prevailing opinion is that if it is shown that there was mala fides or fraud in fact in the transaction, whether the actual fraudulent intent related to existing creditors or was directed exclusively against subsequent creditors, the effect is precisely the same, and subsequent creditors may, on the strength of such fraud, successfully impeach the conveyance."

On the other hand, the Miller mortgage in the case at bar was valid against the bankrupt's creditors who came into existence following the recordation of the Miller chattel mortgage, which admittedly was a valid chattel mortgage against the bankrupt's subsequent creditors.

It is respectfully submitted that the statement of the Court of Appeals in its opinion that the *Moore* case and the present case cannot be distinguished *in principle* is clearly erroneous under the firmly established rule restated by this Court in *Southwestern Sugar Co. v. River Term*

Corp., supra (at p. 215), that "cases are not decided, nor the law appropriately understood, apart from an informed and particularized insight into the factual circumstances of the controversy under litigation."

Clearly, the bankrupt's subsequent creditors could not be placed in the same category with the bankrupt's antecedent creditors; and to permit the subsequent creditors to share equally with the bankrupt's antecedent creditors would result into an unequitable distribution of the bankrupt's estate and into their unjust enrichment at the expense of the Millers.

III.

The Following Statements in the Responsive Brief of the Trustee in Bankruptcy Require Correction.

1. In footnote 3 at page 3 of his responsive brief, the trustee in bankruptcy asserts that it is not true that the bankrupt was insolvent on the dates the Millers' chattel mortgage was executed and recorded and that the opinion of the Court of Appeals "does unfortunately contain a similar error of fact." We respectfully submit that the respondent's such assertion is gainsaid by the record. The record conclusively shows (a) that on the date of the execution of the chattel mortgage the bankrupt came into possession of Miller's going manufacturing plant of the value of $200,000; (b) that the only existing provable claims against the bankrupt on the date of the recordation of the chattel mortgage on August 19, 1954, totalled the sum of $8,906.95 [R. p. 56]; and (c) that the only finding made by the Referee was that the bankrupt was insolvent on or about December 27, 1954, at the time of the repossession by the Millers of the mortgaged property [R. p. 56].

2. At page 8 of his responsive brief, the respondent cites the statement in 4 Collier on Bankruptcy, Par. 70.95, pages 1553-1554, that "Since the decision in the Bay case, no dissenting voice has been raised by courts" and that the *Bay* decision is equally applicable to the facts in the case at bar. We respectfully submit that this point has been adequately covered in the petition for certiorari at pages 20-21 and 24.

3. The assertion made by the respondent at page 9 of his responsive brief that the *Buffum* case (289 U. S. 227) did not modify the holding of this Court in the *Moore* case disregards the statement of Mr. Justice Cardozo that a pledge perfected more than four months before bankruptcy was not subject to an attack by the trustee in bankruptcy *in absence of proof that the pledge was fraudulent in its inception.*

4. At page 12 of his responsive brief the respondent states that there is no conflict between the opinion of the Court of Appeals in the instant case and the decision of the Third Circuit in *In re Consorto Construction Co.*, 212 F. 2d 676. We respectfully submit that the respondent's attempted distinction of the *Consorto* case *supra* is a distinction without a difference. It will be noted that the Pennsylvania Recordation Statute, like the California Recordation Statute, states no time within which recordation must be effected (p. 678 of the opinion). We respectfully submit that the equities in the case at bar cannot be distinguished from the equities in the *Consorto* case *supra* and that the approach made in the *Consorto* case *supra* is realistic in the light of Section 57(K) of the Bankruptcy Act and in the light of the equitable principles of estoppel *in pais* discussed in the certiorari petition which latter

principles we respectfully contend were not respected by the respondent in any manner other than by ignoring them.

Conclusion.

Assuming that the *Moore* decision may be considered as a precedent under the doctrine of *stare decisis* in its application to the present record we respectfully submit that the *Moore* decision raises grave constitutional questions as lucidly pointed out by the Referee in his memorandum opinion [R. pp. 36-37].

As stated by Mr. Justice Black in his dissenting opinion in *United States v. Green*, reported in 78 of the Sup. Ct. Rep. at page 649 (with which the majority of the court was not in disagreement):

> ". . . Ordinarily it is sound policy to adhere to prior decisions but this practice has quite properly never been a blind inflexible rule. Courts are not omniscient. Like every other human agency, they too can profit from trial and error, from experience and reflection. As others have demonstrated, 'the principle commonly referred to as *stare decisis* has never been thought to extend so far as to prevent the courts from correcting their own errors. Accordingly, this Court has time and time again from the very beginning reconsidered the merits of its earlier decisions even though they claimed great longevity and repeated reaffirmation.' (Cases cited.). Indeed, the Court has a special responsibility where questions of constitutional law are involved to review its decisions from time to time and where compelling reasons present themselves to refuse to follow erroneous

precedents; otherwise its mistakes in interpreting the Constitution are extremely difficult to alleviate and needlessly so. (Cases cited.)"

Respectfully submitted,

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